United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2015

To be argued by
JEFFREY I. GLEKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2015

WILLIE ABRAHAM,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEFFREY I. GLEKEL,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Willie Abraham appeals from an order entered on July 5, 1974 in the United States District Court for the Southern District of New York by the Honorable Whitman Knapp, United States District Judge, dismissing, without a hearing and without prejudice to the filing of a motion under Rule 35 of the Federal Rules of Criminal Procedure before Judge Frederick vP. Bryan, a petition, pursuant to Title 28, United States Code, Section 2255, seeking to vacate his 1963 conviction for violation of the federal narcotics laws.

Statement of Facts

Indictment 62 Cr. 949, filed October 22, 1962, charged Abraham in one count with the unlawful possession and transportation of 352 grams of imported heroin in violation of Title 21, United States Code, Sections 173 and 174. After the completion of extensive pre-trial hearings on dis-

covery and suppression motions conducted before the Honorable Edward Weinfeld, United States District Judge, on November 5, 26, and 27, 1962, Abraham entered a plea of guilty on January 8, 1963, before the Honorable John F. X. McGohey, United States District Judge, and was sentenced to a term of five years imprisonment.

Indictment 72 Cr. 1159, filed in the United States District Court for the Southern District of New York on October 16, 1972, charged Abraham in 3 counts with violating Title 21, United States Code, Sections 846, 848 and 843(b). Trial commenced on January 16, 1973 before the Honorable Frederick vP. Bryan, United States District Judge, and a jury and concluded on February 23, 1973, with verdicts of guilty as to Abraham and each of the other nine defendants in the case. On June 26, 1973 Judge Bryan sentenced Abraham to a fifteen year term of imprisonment on Count One, a consecutive four year term of imprisonment on Count Three, and, concurrent to both, a life term of imprisonment on Count Two, which charged Abraham with the unlawful promotion, supervision, and management of a continuing narcotics criminal enterprise in violation of Title 21, United States Code, Section 848. These convictions were affirmed by this Court, *United States* v. *Sisca,* Dkt. No. 73-2017 (2d Cir., May 10, 1974), and Abraham is presently serving his life sentence without possibility of parole.*

On February 22, 1974, Abraham filed a petition pursuant to Title 18, United States Code, Section 2255, seeking to vacate his 1963 conviction on the ground that his guilty plea was involuntary because he would not have entered a guilty plea if he had been aware (1) that he would be ineligible for parole from the sentence to be imposed and

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* Section 848(c) states that the provisions of Title 18, United States Code, Section 4202, which provides for parole, shall not be available to defendants convicted under Section 848.

(2) that the statutory presumption of knowledge of importation contained in Title 21, United States Code, Section 174, was rebuttable. Cf. *United States* v. *Welton*, 439 F.2d 824 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971); *Bye* v. *United States*, 435 F.2d 177 (2d Cir. 1970).

Judge Knapp dismissed the petition in a written opinion without prejudice to the filing of a Rule 35 motion before Judge Bryan on the grounds that the only collateral consequence of the 1963 conviction affecting Abraham was the possibility that the life sentence imposed upon him by Judge Bryan in 1972 was influenced by his allegedly illegal 1963 conviction and that this issue should properly be determined by Judge Bryan.

ARGUMENT

Judge Knapp properly ruled that Abraham's challenge to his 1963 conviction should be decided by Judge Bryan.

The only claim raised on this appeal is that Judge Knapp erred in referring Abraham to Judge Bryan and should have adjudicated the issues raised by the petition. This claim is frivolous.

Regardless of whether Abraham's petition is construed as an attack on his 1963 conviction or his 1972 conviction and sentence, it is absolutely clear that the only collateral consequence he may now be suffering from his 1963 conviction or will suffer in the foreseeable future is the possibility that Judge Bryan was influenced by that conviction in imposing the life sentence Abraham is currently serving. *See United States* v. *Tucker*, 404 U.S. 443 (1972). The proper procedure for adjudicating such a claim, however, is for the sentencing judge, in this case Judge Bryan, to first determine whether he would have imposed a different

sentence if it had been determined that the prior conviction was invalid. If this question is answered in the affirmative, the judge should only then determine whether the prior conviction was invalid, and, if so, he should resentence the defendant. If, however, the sentencing judge determines that his sentence would not have been affected by a determination that the earlier conviction was invalid, there is no need to hold a hearing. *Wilsey* v. *United States*, 496 F.2d 619 (2d Cir. 1974).

Considerations of judicial economy and of avoiding the adjudication of meaningless questions clearly dictate that the claim raised in Abraham's petition be brought before Judge Bryan.* Any hearing and determination by Judge Knapp of the validity of Abraham's 1963 conviction would be a wasteful expenditure of effort if Judge Bryan thereafter determined that he would not have imposed a different sentence even if he had known that the 1963 conviction was invalid. If, on the other hand, Judge Bryan were to make this determination in the first instance, no hearing would be required on Abraham's claim because such a determination would render it moot in the constitutional sense by stripping it of its character as a case or controversy. Since Abraham is serving a life sentence and pursuant to Title 21, United States Code, Section 848(c), will never be eligible for parole, none of the collateral consequences discussed in *Carafas* v. *LaValle*, 391 U.S. 234, 237-38 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968); and *Benton* v. *Maryland*, 395 U.S. 784, 790 (1969) are present in the instant case. *North Carolina* v. *Rice*, 404 U.S. 244 (1971); *Cf. Tannenbaum* v. *New York*, 388 U.S. 439 (1967); *Jacobs* v. *New York*, 388 U.S. 431 (1967). As

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* Since Abraham's petition for certiorari, filed June 10, 1974, is currently pending, he could still properly move under Rule 35 before Judge Bryan. Moreover, Judge Bryan also would have jurisdiction over a habeas corpus petition challenging the sentence Abraham is currently serving on the ground asserted here. *United States* v. *Tucker*, 404 U.S. 443 (1972).

was stated in *Sibron,* a "[c]riminal case is moot *if it appears* that no collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 70 (Fortas, *J.* concurring). Thus a determination by Judge Bryan that he would have imposed a life sentence upon Abraham regardless of the validity of his 1963 conviction would require the dismissal of this petition without a hearing.*

CONCLUSION

The order dismissing the petition should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEFFREY I. GLEKEL,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

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* Even if adjudication of Abraham's claim under these circumstances would not be barred by the case or controversy requirement of Article III of the United States Constitution, certainly the exercise of coram nobis jurisdiction pursuant to Title 28, United States Code, Section 1651(a), the only jurisdiction remaining, would be clearly inappropriate. *Cf, United States* v. *Morgan,* 346 U.S. 502, 511-513 (1954); *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir. 1968); *Correa-Negron* v. *United States,* 473 F.2d 684 (5th Cir.), *cert. denied,* 414 U.S. 870 (1973); *Wharton* v. *United States,* 348 F. Supp. 1026 (W.D. Ark.), *aff'd,* 470 F.2d 510 (8th Cir. 1972).

★ U. S. Government Printing Office 1974— 614—208—428

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JEFFREY I. GLEKEL being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of November, 1974 he served a copy of the within B Mot by placing the same in a properly postpaid franked envelope addressed:

JAY GOLDBERG, ESQ.
244 BROADWAY
NEW York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing IN the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeffrey Glekel

Sworn to before me this

6th day of November, 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975